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Case No. 95-1359

In the
Supreme Court of the United States
October Term, 1995

MARK MARYBOY,
an enrolled member of the Navajo tribe,
Petitioner,

v.

UTAH STATE TAX COMMISSION,
AUDITING DIVISION OF THE UTAH STATE
TAX COMMISSION, and
THE STATE OF UTAH,
Respondents.

Petition for Writ of Certiorari to the
Supreme Court of the State of Utah

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

The questions presented for review by this Court are:

1. Does the Utah Supreme Court's determination that the State of Utah may tax the off-reservation income of an elected county official who resides on the reservation conflict with the U.S. Supreme Court's reasoning as set forth in the long line of cases dealing with Indian taxation.

2. Should this Court grant Mr. Maryboy's petition when it will require a reconsideration of the Utah Supreme Court's factual determination that Mr. Maryboy's income as San Juan County Commissioner was earned off the reservation.

3. Is denial of Mr. Maryboy's petition proper because the issue of whether a state may tax the off-reservation income of an elected county official who resides on the reservation is unlikely to have wide or important application in the area of Indian taxation.

PARTIES TO THE PROCEEDING

Respondents agree with Petitioner's description of the parties to this proceeding.

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OPINIONS AND JUDGMENTS DELIVERED IN THE COURTS BELOW

The Utah State Tax Commission issued its Findings of Fact, Conclusions of Law and Final Decision in this case on March 12, 1993. The decision is unreported, and is included as Appendix A of Respondents' Brief.

The Utah Supreme Court issued its decision on September 14, 1995 and affirmed in part and reversed in part the decision of the Utah State Tax Commission. The Utah Supreme Court's decision is reported as Maryboy v. Utah State Tax Comm'n, 904 P.2d 662 (Utah 1995), and is included as Appendix B of Respondents' Brief.

JURISDICTIONAL STATEMENT

Respondents concur with the jurisdictional statement contained in Petitioner's Brief.

CONSTITUTIONAL AND STATUTORY PROVISIONS

Navajo Treaty of 1868 (15 Stat. 667, 668):

> Article II. The United States agrees that the following district of country, to wit... shall be, and the same is hereby, set apart for the use and occupation of the Navajo tribe of Indians...

Utah Enabling Act (28 Stat. 107, 108):

> That the people inhabiting said proposed state do agree and declare that they forever disclaim

all right and title... to all lands lying within said limits owned or held by any Indian or Indian tribes; and that until the title thereto shall have been extinguished by the United States, the same shall be and remain subject to the disposition of the United States, and said Indian lands shall remain under the absolute jurisdiction and control of the Congress of the United States...

Utah Code Ann. § 59-10-116 (1987):

A tax is hereby imposed on the state taxable income, as defined in Sections 59-10-111 and 59-10-112, of every nonresident individual in accordance with the schedules in Section 59-10-104, but the individual's Utah tax shall be only the portion of the resident tax so calculated as the individual's federal adjusted gross income received from Utah sources (determined under Section 59-10-117) bears to the individual's total federal adjusted gross income for the same taxable year.

Utah Code Ann. § 59-10-117 (1987):

(1) For the purpose of Section 59-10-116, federal adjusted gross income derived from Utah sources shall include those items includable in federal "adjusted gross income" (as defined by Section 62 of the Internal Revenue Code) attributable to or resulting from:

* * *

(b) the carrying on of a business,

trade, profession, or occupation in this state.

STATEMENT OF THE CASE

This case involves a state's right to tax off-reservation income earned by an elected county official, who is also an enrolled member of the Navajo nation residing on the Navajo reservation.

Mark Maryboy is an enrolled member of the Navajo tribe who lives on the Navajo Reservation in Southern Utah. In the late 1980's Mr. Maryboy was elected by the voters of district three of San Juan County to serve as the district's representative on the San Juan County Commission. San Juan County is a political subdivision of the State of Utah. During the same period, Mr. Maryboy was also employed as the Division Director of the Utah Navajo Development Council. Mr. Maryboy's wife, Roselyn Maryboy, was employed by the Utah State Department of Human Services in San Juan County during the same period.

In 1992, the Auditing Division of the Utah State Tax Commission sent Mr. and Mrs. Maryboy a Notice of Deficiency assessing the Maryboy's additional taxes, penalties and interest on their income for the years 1988, 1989, and 1990. The Maryboys appealed the notice to the Utah State Tax Commission.

The Utah State Tax Commission set forth its findings of fact, describing the Maryboys' respective jobs, the location where each performed their duties, whether the location was on or off the reservation, and the number of days each spent on or off the reservation performing their various tasks. (Utah St. Tax

Comm. Dec., App. A, at 2-8).

The Tax Commission held that both Mr. and Mrs. Maryboy's incomes as state employees were taxable to Utah because they were paid with off-reservation funds and enjoyed the benefits of state and county employment. The Commission reasoned that as state employees, the Maryboy's willingly accepted positions with off-reservation entities, subjecting themselves to state jurisdiction and state taxation. However, the Tax Commission found that Mr. Maryboy's income from the Utah Navajo Development Council was not taxable and was pre-empted by federal law because the funds held in trust by the State of Utah were allocated through an act of Congress. (Utah St. Tax Comm. Dec., App. A, at 11.)

The Maryboys appealed the Tax Commission's decision to the Utah Supreme Court. The Utah Supreme Court held that Mrs. Maryboy's income as a therapist for San Juan County Mental Health was entirely dependent on the need of Reservation Navajos for mental health services. Thus, the court found that her income was "value derived from on-reservation conduct involving only tribal members." The court held that under the reasoning of McClanahan v. State Tax Comm'n of Arizona, 411 U.S. 164 (1973), the state would be precluded from taxing this type of activity in the private sector because it would be within the scope and reach of Federal and tribal treaties and statutes. Maryboy v. Utah State Tax Comm'n, 904 P.2d 662, 668 (Utah 1995) (App. B at 18).

The Utah court also reasoned that Mrs. Maryboy's activities did not take her beyond the boundaries of the reservation because she was hired to provide mental health services to Navajos living on the Reservation. The court therefore rejected the Tax Commission's arguments and held

that Utah had no right to assess income tax on Mrs. Maryboy's income. Maryboy, 904 P.2d at 669 (App. B at 19).

With respect to Mr. Maryboy's income as a San Juan County commissioner, however, the Utah court found that the activities performed by Mr. Maryboy were for the benefit of San Juan County and affected the lives of all of the citizens of San Juan County, whether or not they are Reservation Navajos. Although elected by the residents of district three, Mr. Maryboy's decisions had county-wide effect. Furthermore, Mr. Maryboy does not lose his status or powers as county commissioner when he is on the reservation. The court concluded that Mr. Maryboy's income is not derived from on-reservation sources. The court found that his employment as a Utah public official is beyond the reservation boundaries and the reach of tribal self-government, and therefore his income is subject to Utah income tax. Maryboy, 904 P.2d at 669-670 (App. B at 20).

SUMMARY OF THE ARGUMENT

In making its determination that Mr. Maryboy's off-reservation income as a San Juan County Commissioner is subject to the Utah income tax, the Utah Supreme Court carefully analyzed the United States Supreme Court cases which deal with Indian taxation. The Utah court reconsidered the Utah Tax Commission's factual determination that Mr. Maryboy's income was earned off the reservation. The court then weighed the various state, federal and tribal interests and applied the legal precedents to the facts before it to determine that Mr. Maryboy's income was off-reservation income, and that the State of Utah was not pre-empted by federal or tribal interests in taxing that income. This determination is consistent

with this Court's analysis and holdings in the area of Indian taxation because the Court has held that a state may impose income tax on off-reservation tribal enterprises.

The granting of a petition for writ of certiorari in this case will require this Court to review the extensive factual determinations made by both the Utah State Tax Commission and the Utah Supreme Court. In cases which ostensibly turn on the facts and evidence, this Court has repeatedly declined to grant a petition for writ of certiorari. Furthermore, when faced with a review of facts, this Court generally upholds the determinations made by courts below unless the findings are clearly erroneous. The findings of the Utah State Tax Commission and the Utah Supreme Court are well supported by the record.

Finally, a decision by the Court on these facts is unlikely to have wide or significant impact on Indians who live on or off reservations. The issue presented by Mr. Maryboy's petition is narrow on its facts - it involves a state's right to tax the off-reservation income of a county commissioner who lives on the reservation. The unique positions of the parties are unlikely to be repeated in other states.

ARGUMENT

I. THE UTAH SUPREME COURT'S DECISION IN MARYBOY DOES NOT CONFLICT WITH THIS COURT'S REASONING IN THE EXTENSIVE LINE OF CASES ON INDIAN TAXATION.

The Utah Supreme Court correctly applied the law which has developed in the long line of cases decided by this Court. The Utah court first considered the twin barriers to state regulation of Indian people: federal preemption and Indian sovereignty. The court recognized that the federal preemption analysis in state regulation of Indian affairs is unique to this area and necessarily differs from federal preemption in other areas of the law because of the backdrop of Indian sovereignty. Recognition of the special quality of federal preemption in the area of Indian affairs is confirmed by this Court's analysis. McClanahan v. State Tax Comm'n of Arizona, 411 U.S. 164 (1973); Moe v. Confederated Salish & Kootenai Tribes, 425 U.S. 463 (1976); and Mescalero Apache Tribe v. Jones, 411 U.S. 145 (1973).

The Utah Supreme Court also recognized and considered this Court's presumption in favor of finding Indian immunity from state taxation. The Utah Supreme Court correctly stated that "an express congressional statement preempting a state's assertion of authority is not required; state action may be preempted solely by reason of federal policies and interests." Maryboy v. Utah State Tax Comm'n, 904 P.2d 662, 666 (Utah 1995) (citing White Mountain Apache Tribe v. Bracker, 448 U.S. 136 (1980)) (App. B at 12).

The Utah court recognized this Court's more recent confirmation of the presumption against finding state taxing

authority. See Maryboy, 904 P.2d at 668 (App. B at 16). However, the court also recognized this Court's ruling in Moe against finding automatic exemptions from state regulation, and instead applied the analysis prescribed in White Mountain: "a particularized inquiry into the nature of the state, federal and tribal interests at stake...." Moe, 425 U.S. at 481 n. 17; White Mountain, 448 U.S. at 145.

Therefore, to reach the question of whether the State of Utah can tax Mr. Maryboy's income as a San Juan County Commissioner, the Utah Supreme Court weighed the state regulatory interests in taxation. The weighing of state interests mirrors the analysis by this Court in McClanahan, Mescalero, California v. Cabazon Band of Mission Indians, and White Mountain. McClanahan, 411 U.S. 164; Mescalero, 411 U.S. 145; California v. Cabazon Band of Mission Indians, 480 U.S. 202 (1987).

The Utah Supreme Court also carefully considered tribal sovereignty, the second barrier to the exercise of state authority over Indian affairs. The Utah court acknowledged this Court's pronouncement to accommodate "the interests of the Tribes and the Federal Government, on the one hand, and those of the State, on the other." Maryboy, 904 P.2d at 666 (citing Washington v. Confederated Tribes of Colville Reservation, 447 U.S. 134, 156 (1980)) (App. B at 13).

Using tribal sovereignty as a backdrop to the federal preemption analysis, the Utah court determined that an analysis of state, tribal and federal interests was necessary. The Utah court found both the federal interests and tribal interests at stake in Maryboy to be similar to those in McClanahan. McClanahan, 411 U.S. 164. Mr. Maryboy does not dispute this finding.

The Utah court recognized that the facts in Maryboy depart significantly from the facts in McClanahan and Oklahoma v. Sac & Fox Nation, 508 U.S. ___, 124 L.Ed 2d 30 (1993), because, although the federal and tribal interests are similar, the state interests in Maryboy are divergent and compelling. The Utah Supreme Court correctly stated that "(t)he state's interest could not be more compelling than when it involves a publicly elected official acting in his capacity as a representative of the state and performing a state function." Maryboy, 904 P.2d at 669 (App. B at 19-20).

The Utah court's recognition of this important state interest is consistent with this Court's determination that the State of New Mexico had compelling interests at stake in imposing oil and gas severance taxes. Cotton Petroleum Corp. v. New Mexico, 490 U.S. 163 (1989).

The Utah court followed this Court's analysis in Cotton Petroleum by evaluating the burden that the imposition of state income taxes on Mr. Maryboy's income as San Juan County Commissioner creates on the ability of tribal members to make their own laws and to be governed by them. By finding that Mr. Maryboy's employment as a publicly elected official was "beyond the Reservation boundaries and tribal self-government," the Utah Supreme Court correctly concluded that Utah's imposition of the income tax on Mr. Maryboy's income was nondiscriminatory and did not interfere with the tribe's power to impose its own income tax. Maryboy, 904 P.2d at 669 (App. B at 21). This determination is consistent with this Court's pronouncements in Mescalero Apache Tribe v. Jones, Colville, and Cotton Petroleum. Mescalero Apache Tribe v. Jones, 411 U.S. 145 (1973); Colville, 447 U.S. 134; Cotton Petroleum, 490 U.S. 163.

Ultimately, both the Utah Supreme Court and the Utah State Tax Commission found that Mr. Maryboy's income was earned off the reservation. In Mescalero, this Court held that a state could impose income tax on off-reservation tribal enterprises. Unless this Court disagrees with the factual determinations made in both lower adjudications, the decision of the Utah Supreme Court follows prior case law.

Every step of the Utah Supreme Court's analysis reflects a careful and reasoned application of this Court's guiding principles on state regulation of Indian activities. No conflict exists between the Utah court's decision and the line of cases handed down by this Court. Thus the petition for writ of certiorari should be denied.

II. THIS COURT SHOULD DENY THE PETITION BECAUSE THE ISSUES RAISED BY MR. MARYBOY PRESENT QUESTIONS OF FACT.

The exercise of certiorari is within the absolute discretion of this Court. This Court has denied certiorari when a lower court decision turns primarily on an analysis of the facts involved. "We do not grant a certiorari to review evidence and discuss specific facts." United States v. Johnson, 268 U.S. 220, 227 (1925).

The outcome of this case necessarily turns on an interpretation of the facts and a reconsideration of the evidence before the Court. In order to reach the argument urged by Maryboy, the Court must first decide whether Mr. Maryboy's income is earned on the reservation or off the reservation, a question of fact.

If this Court grants certiorari, the Court will hear argument and be compelled to decide whether Mr. Maryboy works within the county boundaries or within the reservation boundaries. Mr. Maryboy argues that because 99% of district three of the county is comprised of Indian land, he works on the reservation. Although this is true of district three, the entire county of San Juan is comprised of mostly non-reservation land. Mr. Maryboy's employer is San Juan County, not district three. Maryboy's salary is paid by San Juan County, not district three. When Mr. Maryboy acts officially, he is never on the reservation - all San Juan County commission meetings are held in Blanding, Utah, off the reservation. Mr. Maryboy's decisions have county-wide effect.

This Court has consistently held that it will not overturn the factual determinations of lower courts unless those determinations are clearly erroneous. In Commissioner of Internal Revenue v. Duberstein, 363 U.S. 278 (1960), this Court discussed the "clearly erroneous" standard: "'(A) finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.'" Id. at 291 (quoting United States v. United States Gypsum Co., 333 U.S. 364, 395 (1948)). See also C.J.D. Rudolph v. United States, 370 U.S. 269 (1962); and Rice v. Sioux City Memorial Park Cemetary, 349 U.S. 70 (1954).

Previously, this Court has dismissed a writ of certiorari as improvidently granted when the Court decided that the matter involved a question of fact, and did not merit Court review. NLRB v. Hendricks County Rural Electric Corp., 454 U.S. 170 (1981). In Hendricks, the Supreme Court dismissed a cross-petition which asked the Court to determine whether an employee was the functional equivalent of a personnel

department employee, and therefore excluded from coverage under the National Labor Relations Act.

Mr. Maryboy presents a similar analysis. It is the nature of Mr. Maryboy's employment which determines whether the State of Utah may tax his income. To reach this determination, the Utah State Tax Commission carefully enumerated Mr. Maryboy's duties. It listed the locations where Mr. Maryboy's duties were performed.

The Utah Supreme Court carefully considered factors such as the amount of the voting district covered by the Navajo reservation, the source of Mr. Maryboy's earnings, Mr. Maryboy's responsibilities, and the location where Mr. Maryboy's duties were performed. Both the Utah State Tax Commission and the Utah Supreme Court determined that based on these factors, Mr. Maryboy's income was not derived from activities on the reservation because Mr. Maryboy is functioning in a county capacity.

The Utah Supreme Court determined that "Mr. Maryboy's employment as a publicly elected official in the State of Utah is necessarily beyond the Reservation boundaries and tribal self-government. As such, it is subject to the same nondiscriminatory tax laws otherwise applicable to citizens of Utah." Maryboy, 904 P.2d at 670 (App. B at 21).

In Tacon v. Arizona, 410 U.S. 351 (1973), this Court dismissed the writ of certiorari because the Court found that the only issue presented by the petitioner involved a factual determination which did not warrant the exercise of the Supreme Court's certiorari jurisdiction. In Tacon, the issue was whether the petitioner's conduct was a knowing or intelligent waiver of his right to be present at trial. Similarly, Mr.

Maryboy's petition requires the United States Supreme Court to review the facts already considered by both the Utah State Tax Commission and the Utah Supreme Court, and to make a determination based on those facts, of whether Mr. Maryboy's income was earned on or off the reservation. Thus, as in Tacon, this Court should deny Mr. Maryboy's petition.

III. THE COURT SHOULD DENY MR. MARYBOY'S PETITION BECAUSE THE ISSUES ARE INSUBSTANTIAL AND ISOLATED.

Members of the U.S. Supreme Court have said that the Court's role is to pass upon questions of wide import under the Constitution, laws and treaties of the United States; to resolve conflicts of opinion on federal questions; and to exercise supervisory power over lower federal courts.[1]

The threshold requirement for review of a state court's decision is the existence of a federal question. Rules of the Supreme Court, Rule 10.1(c) . The federal question must also be substantial. Rule 10 of the Rules of the Supreme Court states that "[A] petition for a writ of certiorari will be granted only when there are special and important reasons therefor." Id.

In assessing the substantiality of the issues contained in a petition, the Court may consider the nonrecurring nature of the conflict and the minor or technical quality of the dispute. See Robert L. Stern, Eugene Gressman, Stephen M. Shapiro & Kenneth S. Geller, Supreme Court Practice, at 171 (7th ed. 1993). If the issues affect a very limited number of people, do

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[1] Address of Chief Justice Vinson before the American Bar Association, Sept. 7, 1949, 69 S.Ct. v, vi.

not concern a substantial area of federal law, or are unlikely to be brought up again in the future, the Court should consider saving its limited resources for more important considerations.

In Rudolph v. United States, 370 U.S. 269 (1962), the Court had originally granted a petition for certiorari because it thought the case presented important questions on the definition of certain terms under the Internal Revenue Code. The District Court had made factual findings which were approved by the Court of Appeals. The United States Supreme Court later dismissed the writ of certiorari as improvidently granted because the case turned on a review of the facts, which would have no importance to anyone save the litigants.

Mr. Maryboy's petition, although important to him in a monetary sense, is not of grave concern to the Indian people living on tribal lands of the United States. The issue in this case affects only Native Americans who are also elected state officials and live on reservations. Although Mr. Maryboy characterizes this case as an important determination of tribal sovereignty, this issue fails to rise to the level of importance given to previous Supreme Court determinations in the area of state taxation of Indians because the Utah court's decision narrowly applies to those tribal members who live on a reservation and hold elected state government positions for which they receive compensation. Were other state courts to be presented with a similar issue, they would have to make the same careful, fact intensive determinations made by the Utah State Tax Commission and the Utah Supreme Court. A United States Supreme Court decision in this case could be easily distinguished by other state courts if those courts were presented with a different set of facts.

The line of cases which has been developed by this

Court in the area of Indian taxation involves a significant application of the federal preemption doctrine, limitations of states' powers, and statements of tribal sovereignty. In contrast, the fact-intensive analysis required in Maryboy is peripheral to the central issues already decided by this Court.

This Court has previously decided that a state may not tax on-reservation income of Indians who reside on the reservation, nor may it impose a personal property tax on property located on tribal land. Bryan v. Itasca County, 426 U.S. 373 (1976); McClanahan v. State Tax Comm'n of Arizona, 411 U.S. 164 (1973).

This Court has also decided that a state may tax off-reservation income of tribal members who live on the reservation, and a state may impose sales tax on on-reservation purchases by non-members. Mescalero Apache Tribe v. Jones, 411 U.S. 145 (1973); Washington v. Confederated Tribes of the Colville Indian Reservation, 447 U.S. 134 (1980).

The line of cases in this area has developed slowly and carefully. Each case involves either a matter which would have great impact on a significant number of tribes or tribal members, or involves an interpretation of an important federal act or treaty. The philosophical underpinnings articulated by the Supreme Court to define the areas of state, federal and tribal rights are of greater import than the narrow and insubstantial issues raised in Mr. Maryboy's petition.

CONCLUSION

The Utah Supreme Court properly applied existing law. The issues presented by this case are factual, not legal, and the conclusion turns on a narrow, limited set of facts that do not present a substantial, recurring issue meriting the attention of this Court. The petition for a writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX A

BEFORE THE UTAH STATE TAX COMMISSION

MARK & ROSELYN MARYBOY,	)	
Petitioners,	)	FINDINGS OF FACT, CONCLUSIONS OF LAW, AND FINAL DECISION
AUDITING DIVISION OF THE UTAH STATE TAX COMMISSION,	)	Appeal No. 92-1045 Account No. 585-76-5012
Respondent.	)	

STATEMENT OF CASE

This matter came before the Utah State Tax Commission for a formal hearing on November 12, 1992. Tax Commissioners Joe B. Pacheco and S. Blaine Willes heard the matter. Lisa L. Olpin, Administrative Law Judge presided. Present and representing Petitioners was Russell Kearl, an attorney. Present and representing Respondent was Brian Tarbet, Assistant Utah Attorney General.

Prior to the introduction of testimony at the hearing, Petitioners made a motion to limit the scope of the hearing to Mark Maryboy's income earned as a San Juan County

Commissioner and his wife's income earned as a state employee.

Petitioners offered to accept a compromise earlier discussed with the Auditing Division regarding the taxation of Mark Maryboy's income earned as a division director at the Utah Navajo Development Counsel.

The Auditing Division responded, however, that the compromise was no longer viable as the entire matter was now before the Tax Commission as evidenced in Petitioners' petition for redetermination. Respondent had since then altered its stance and at the time of the hearing was seeking 100% taxation of all of Petitioners' incomes.

The Commission denied Petitioners' motion to limit the scope of the hearing.

Based upon the evidence and testimony presented at the hearing, the Tax Commission hereby makes its:

FINDINGS OF FACT

1. The tax in question is personal income tax.
2. The years in question are 1988 through 1990.
3. Petitioners were at all times enrolled members of the Navajo tribe.

4. During the period in question, Petitioners lived in Montezuma Creek, Utah. Their home is located on the Navajo Indian Reservation.

5. The Montezuma Creek area consists of tribal land, Bureau of Land, private land and public land.

6. During the years in question, Roselyn Maryboy was a paid Utah state employee working at Utah State Mental Services. She had been so employed since 1980 as a clinician, providing outpatient counseling among other services, to Utah Navajos located on the reservation.

7. Ms. Maryboy speaks Navajo.

8. As a state employee, Ms. Maryboy worked out of the state office located at Montezuma Creek. She was uncertain if the office is located on the reservation.

9. One day per week Ms. Maryboy attends a staff meeting at the main office in Blanding, Utah located off of the reservation. There she obtains more clinical training and updates her records. She leaves Blanding between 2:00 and 3:00 p.m. and returns to her duties in Montezuma Creek.

10. In addition to traveling to Blanding weekly, Ms. Maryboy also works off of the reservation once a month

when she visits Bluff School. Once a year she is a guest speaker at San Juan High School located off of the reservation.

11. During the years in question, Ms. Maryboy was assigned
to Navajo Indian Reservation cases only.

12. Typically, Ms. Maryboy spends one to two hours per day in the Montezuma Creek office and the remainder of her time on the reservation. Some days she is never in the office as she is on the reservation.

13. While she is paid for eight hour days, Ms. Maryboy occasionally sees clients in her home. She works as if she is on-call twenty-four hours a day.

14. While Ms. Maryboy spends time in the Montezuma Creek office, approximately 80% of her duties are performed out of the office and on the reservation.

15. Mark Maryboy was employed as a San Juan County Commissioner and as a Division Director of the Utah Navajo Development Council (U.N.D.C.) during the years in question.

16. As a county commissioner elected by and

representing District Three of San Juan County, Mr. Maryboy is paid by San Juan County.

17. Nearly 99% of District Three is comprised of the Navajo Indian Reservation. The communities of Bluff and Mexican Hat are within District Three, but are not located on the reservation.

18. Approximately ninety percent of the constituents in District Three are Navajos; however, not all of these Navajos actually live on the reservation.

19. As a county commissioner, Mr. Maryboy travels weekly to Monticello, Utah located off of the reservation. There Mr. Maryboy spends eight hours in Monticello preparing for and attending a county council meeting. In addition to participating in countywide issues, Mr. Maryboy represents to the county council the concerns of District Three.

20. Initially, Mr. Maryboy was assigned to the library and recreation boards. When he learned that the Navajo people did not participate in these programs, he was re-assigned to handle Navajo reservation programs. Primarily, Mr. Maryboy coordinates county programs, such

as public safety and natural resources with the Navajo Nation.

21. Typically, Mr. Maryboy meets twice a month with the six individual, local Navajo governments (known as chapters) located on the reservation within District Three.

22. Since he speaks Navajo, Mr. Maryboy would also help out in District Two and meet with the two chapters located on the Navajo Reservation within its boundaries.

23. Aside from the weekly counsel meeting in monticello, Mr. Maryboy travels to Salt Lake once a month on county commission business. He also spends time in Salt Lake when the state legislature is in session. Once a year Mr. Maryboy goes to a nationwide meeting for county commissioners.

24. When Mr. Maryboy is not attending meetings outside of his district, he spends the remainder of his time consulting with his constituents. With the exception of two yearly meetings in Bluff, Mr. Maryboy is on the reservation performing county commission duties. Mr. Maryboy often works in Window Rock, Arizona at tribal headquarters.

25. For the period in question, Mr. Maryboy spent 75% of his time per year as a county commissioner working

on the Navajo reservation.

26. While employed by San Juan County, Mr. Maryboy also had a second job as a director of the U.N.D.C. Mr. Maryboy was paid from U.N.D.C. funds which are derived from the Utah Navajo Trust Fund.

27. This trust fund is the result of an Act of Congress, granting federal monies and royalties to the Navajo Nation, a portion of which the state of Utah holds in trust.

28. As the U.N.D.C. division director, Mr. Maryboy supervised education and teen pregnancy programs on the reservation.

29. He worked four days per week, eight hours per day in this capacity.

30. Although U.N.D.C. headquarters were located off the reservation in Bluff, Mr. Maryboy spent the majority of his time on the reservation.

31. On a yearly basis Mr. Maryboy spent 75% of his time as division director at the U.N.D.C. on the reservation.

32. The Auditing Division contends that 100% of Roselyn Maryboy's income earned as a state of Utah

employee is taxable to Utah. Respondent also claims that 100% of both of Mark Maryboy's incomes as a San Juan County Commissioner and U.N.D.C. Division Director are taxable to Utah.

33. Respondent argues that these incomes are taxable since they were earned from off reservation sources, i.e., the state of Utah, San Juan County and the U.N.D.C.

34. Petitioners assert that the percentage of income earned while working on the reservation is not taxable. In this case, Petitioners argue that only 20% of Roselyn Maryboy's income, 25% of Mary Maryboy's income as a county commissioner and 25% of his income as U.N.D.C. division director are taxable for each of the years in question.

CONCLUSIONS OF LAW

Due to the unique relationship existing between the Indian tribes and the U. S. Government, the states are cautious to in any way encroach upon the broad power Congress has granted itself to regulate tribal affairs.

Before a state may exercise authority over an Indian reservation or its tribal members, it must first determine

whether or not its assertion of power is pre-empted by federal law. Secondly, it must ascertain whether or not the state is infringing upon the right of reservation Indians to make their own laws and to be ruled by them. If federal pre-emption exists or there is an infringement on the Indian right to self-government that outweighs any state interest, the state's exercise of authority is unlawful.

When on-reservation conduct involving only Indians is at issue, state law is generally inapplicable, for the state's regulatory interest is likely to be minimal and the federal interest in encouraging self-government is at its strongest. White Mountain Apache v. Bracker, 448 U.S. 136, 144 (1980). In the case of Indians going beyond reservation boundaries, however, a nondiscriminatory state law is generally applicable in the absence of express federal law to the contrary. Mescalero Apache Tribe v. Jones, 411 U.S. 145, 148 (1973).

Federal pre-emption is usually found if after an inquiry into the nature of the state, federal and tribal interests it is determined that the state authority would violate federal law or policy. An express congressional statement or law is

not required in order to find pre-emption.

DECISION AND ORDER

The fact pattern as presented in the case before the Tax Commission appears to be one of first impression. The circumstances involved are not on-point with situations described in precedent case. This is not a case where the state attempts to tax a reservation Indian for income earned exclusively on the reservation as discussed in McClanahan v. Arizona Tax Commission, 411 U.S. 164 (1973).

Venturing into a previously untrodden arena, the Tax Commission holds that the total income of Roselyn Maryboy, a state employee, is taxable to Utah. Likewise, the Commission finds that the total income of Mary Maryboy as county commissioner is taxable to Utah.

Petitioners are salaried with off-reservation funds and enjoy benefits of state and county employment. As a state employee and county commissioner, Petitioners have taken positions with entities off the reservation, subjecting themselves to state jurisdiction and consequently, state taxation of their incomes.

Based upon the facts presented, the Tax Commission

expressly rejects Petitioners' proposition that the location of where the work is performed, in this case on the reservation to a large degree, dictates the extent the state and/or county can tax its own employees.

Turning to Mark Maryboy's income earned as director of the Utah Navajo Development Council, the Tax Commission finds that this income is not taxable to Utah on the grounds of federal pre-emption.

As U.N.D.C. director, Mr. Maryboy was salaried by funds allocated through an act of Congress. This trust fund was explicitly created for the welfare of the Indian people to help them in their quest for self-government. As such, the state cannot infringe upon this right by taxing a tribal member's income derived from the trust fund.

Based upon the foregoing, the Tax Commission holds that Roselyn Maryboy's income as a paid state employee and Mary Maryboy's income as a county commissioner are fully taxable to Utah for the years 1988 through 1990. Mr. Maryboy's income earned as director of the Utah Development Council, however, is not taxable for the time period. It is so ordered.

DATED this 12th day of March, 1993.

BY ORDER OF THE UTAH STATE TAX COMMISSION.

ASSENT

/s/ R. H. Hansen

R. H. Hansen Chairman	Roger O. Tew Commissioner
/s/ Joe B. Pacheco Commissioner	/s/ S. Blaine Willes Commissioner

NOTICE: You have twenty (20) days after the date of the final order to file a request for reconsideration or thirty (30) days after the date of final order to file in Supreme Court a petition for judicial review. Utah Code Ann. §§63-46b-13(1), 63-46b-14(2)(a).

MAILING CERTIFICATE

I hereby certify that I mailed a copy of the foregoing Decision to the following:

Mary & Roselyn Maryboy
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Salt Lake City, UT 84111

DATED this 12th day of March, 1993.

/s/ Sara Jenson
Secretary

APPENDIX B

Copr. (C) West 1995 No claim to orig. U.S. govt. works
904 P.2d 662
(Cite as: 904 P.2d 662)

Mark and Roselyn MARYBOY, Petitioners,

v.

UTAH STATE TAX COMMISSION, Auditing Division of the State Tax Commission, and the State of Utah, Respondents.

No. 930173.

Supreme Court of Utah.
Sept. 14, 1995.

Indian taxpayers brought action against State Tax Commission and others to challenge assessment of income taxes on their earnings as county commissioner and state employee. The Supreme Court, Stewart, Associate C.J., held that: (1) imposition of income taxes on Indian state employee who provided mental health services to Indians on reservation was preempted by federal law; (2) state's interest in imposing income tax on Indian county commissioner was sufficient to overcome presumption against state authority to impose tax on Indians; and (3) tax commissioner's order requiring taxpayers to deposit deficiency of income taxes as prerequisite to filing tax appeal did not violate their constitutional right to have open access to courts.

Affirmed in part; reversed in part.

Howe, J., concurred in part, dissented in part, and filed statement.

[1] INDIANS k32(3)

209k32(3)
Federal law may preempt exercise of state authority over Indians; in this context, standards of preemption that have emerged in other areas of law are not appropriate.

[2] INDIANS k32(3)
209k32(3)
Concept of Indian sovereignty, which traditionally barred extension of state law to reservations, must guide determination as to whether federal law preempts exercise of state authority.

[3] INDIANS k32(3)
209k32(3)
In determining whether federal law preempts exercise of state authority over Indians, ambiguities in treaties and federal statutes are to be construed generously in light of firm federal policy of promoting tribal self-sufficiency and economic development; thus, express congressional statement preempting state's assertion of authority is not required.

[4] INDIANS k32(3)
209k32(3)
State exercise of authority over Indians may be preempted solely by reason of federal policies and interests.

[5] INDIANS k32(3)
209k32(3)
In determining whether state is preempted from exercising authority over Indians, state regulatory interests must be given great weight.

[6] INDIANS k32(2)
209k32(2)
Even on reservations, state law may be applied to Indians unless

its application would interfere with tribal self-government or impair right granted or reserved by federal law.

[7] INDIANS k32(3)
209k32(3)
In determining whether federal law preempts exercise of state authority over Indians, court must make particularized inquiry into nature of state, federal, and tribal interests at stake designed to determine whether, in specific context, exercise of state authority would violate federal law.

[8] INDIANS k32(2)
209k32(2)
State's exercise of authority over Indians may unlawfully infringe on right of reservation Indians to make their own laws and be ruled by them.

[9] INDIANS k32(2)
209k32(2)
If both tribe and state could fairly claim interest in asserting their respective jurisdictions, principles of tribal self-government were designed to resolve conflict between exercise of state authority and Indian rights by providing that state could protect its interests up to point where tribal self-government would be affected.

[10] INDIANS k32(2)
209k32(2)
Reservation activity involving only tribal members is generally exempt from state law.

[11] TAXATION k940
371k940
When state taxation of Indians is at issue, tribal interests are

strongest when tax is based on value derived from on-reservation conduct involving only tribal members and where taxpayer is recipient of tribal services.

[12] TAXATION k940
371k940
State tax on Indians is generally valid when tax is directed at value generated off reservation and taxpayer is recipient of state's services.

[13] TAXATION k940
371k940
There is presumption, rather than per se rule, against state taxing authority over Indians which counsels against finding state jurisdiction to tax Indians residing on reservation or in Indian country.

[14] TAXATION k940
371k940
Imposition of income taxes on state employee who was member of Indian tribe and resided on reservation was preempted by federal treaty which set apart reservation for use and occupation of tribe, in view of evidence that Indian was employed as therapist for Indians living on reservation and that her employment activity depended entirely on Indians' needs for mental health services. Treaty with the Navajo Indians, Art. II, 15 Stat. 667.

[15] TAXATION k940
371k940
Fact that Indian who was employed by state as Indian reservation therapist participated in administrative and training activities off reservation did not alter her employment so as to take her beyond boundaries of reservation and subject her to

state income taxes.

[16] TAXATION k940
371k940
State's interest in imposing income taxes on county commissioner who was member of Indian tribe and lived on reservation was sufficient to overcome presumption against state authority to impose income taxes on Indian, where, as county commissioner, he represented citizens of entire county, where, although he was elected by constituents of district encompassing Indian reservation, his duties and policy-making power had county-wide effect, and where allowing state to tax Indian county commissioner did not create substantial burden on ability of tribal members to make their own laws and be governed by them.

[17] ADMINISTRATIVE LAW AND PROCEDURE k791
15Ak791
In reviewing Tax Commission's order, Supreme Court grants Commission deference concerning its factual determinations, applying substantial evidence standard of review.

[17] TAXATION k1088
371k1088
In reviewing Tax Commission's order, Supreme Court grants Commission deference concerning its factual determinations, applying substantial evidence standard of review.

[18] ADMINISTRATIVE LAW AND PROCEDURE k791
15Ak791
"Substantial evidence" is that quantum and quality of relevant evidence that is adequate to convince reasonable mind to support conclusion.
See publication Words and Phrases for other judicial

constructions and definitions.

[19] ADMINISTRATIVE LAW AND PROCEDURE k786
15Ak786
In reviewing Tax Commission's order, Supreme Court does not reweigh evidence but defers to Commission to resolve issues involving conflicting views if its findings are supported by substantial evidence.

[19] ADMINISTRATIVE LAW AND PROCEDURE k791
15Ak791
In reviewing Tax Commission's order, Supreme Court does not reweigh evidence but defers to Commission to resolve issues involving conflicting views if its findings are supported by substantial evidence.

[19] ADMINISTRATIVE LAW AND PROCEDURE k793
15Ak793
In reviewing Tax Commission's order, Supreme Court does not reweigh evidence but defers to Commission to resolve issues involving conflicting views if its findings are supported by substantial evidence.

[19] TAXATION k1088
371k1088
In reviewing Tax Commission's order, Supreme Court does not reweigh evidence but defers to Commission to resolve issues involving conflicting views if its findings are supported by substantial evidence.

[20] CONSTITUTIONAL LAW k328
92k328
Requirement that taxpayers deposit deficiency of income taxes, penalties and interest prior to pursuing tax appeal did not violate their constitutional right to have open access to courts,

in view of evidence that taxpayers had financial ability to pay disputed taxes, but simply found it "inconvenient" to do so. U.C.A.1953, 59-1-505.

[20] TAXATION k962
371k962
Requirement that taxpayers deposit deficiency of income taxes, penalties and interest prior to pursuing tax appeal did not violate their constitutional right to have open access to courts, in view of evidence that taxpayers had financial ability to pay disputed taxes, but simply found it "inconvenient" to do so. U.C.A.1953, 59-1-505.

***663** Bill Thomas Peters, David W. Scofield, Salt Lake City, for petitioners.

Jan Graham, Atty. Gen., Brian L. Tarbet, Asst. Atty. Gen., Salt Lake City, for respondents.

***664** Herb Yazzie, Joe Lennihan, Window Rock, for amicus Navajo Nation.

STEWART, Associate Chief Justice:

Petitioners Mark and Roselyn Maryboy appeal a decision of the Utah State Tax Commission assessing Utah income tax on their earnings as a county commissioner and a state employee, respectively, during the years 1988 through 1990. The Maryboys also appeal the Commission's decision requiring them to pay $10,855.38 in taxes, penalties, and interest prior to pursuing this appeal.

The Maryboys are enrolled members of the Navajo Tribe and at all relevant times lived in Montezuma Creek, Utah, on the Navajo Reservation ("the Reservation"). Mr. Maryboy is employed as a San Juan County Commissioner and was elected by voters in district three of San Juan County, a political

subdivision of the State of Utah. Nearly ninety-nine percent of district three lies within the Reservation. Approximately ninety percent of the voters in district three are Navajo, but not all of these Navajos live on the Reservation. Mr. Maryboy is paid by San Juan County.

During the years in question, Mr. Maryboy spent much of his time as a county commissioner working on the Reservation. Mr. Maryboy's responsibilities included coordinating with the Navajo Nation county programs dealing with such matters as public safety and natural resources; meeting with the six Navajo governmental units, known as chapters, located within district three; consulting with constituents; and performing other county commission duties. Because he speaks Navajo, Mr. Maryboy also assisted the county commissioner in district two and met with the two Navajo chapters located on the Reservation within district two boundaries.

Mr. Maryboy was also employed as the Division Director of the Utah Navajo Development Counsel (UNDC) during the years in question. As a division director, Mr. Maryboy supervised education and teen pregnancy programs on the Reservation. Although UNDC headquarters was located off the Reservation in Bluff, Utah, Mr. Maryboy spent a large percentage of his time as a division director working on the Reservation. Mr. Maryboy was paid from UNDC funds which were derived from the Utah Navajo Trust Fund.

Mrs. Maryboy is employed by San Juan Mental Health of the Utah Department of Human Services to provide mental health services and outpatient counseling to Utah Navajos living on the Reservation. She works out of the state office located at Montezuma Creek, Utah, and also sees clients in her

home. During the years in question, Mrs. Maryboy performed approximately eighty percent of her duties on the Reservation.

Mrs. Maryboy's duties off the Reservation included attending staff meetings one day a week at the main office in Blanding, Utah. She also received clinical training and updated her records there. In addition, Mrs. Maryboy worked off the Reservation at Bluff School once a month and at San Juan High School once a year.

The Commission's Auditing Division determined that all income earned by the Maryboys during the years 1988 through 1990, except Mr. Maryboy's income as a director of the UNDC, was fully taxable in Utah. The Maryboys appealed the determination, and a hearing was held before the Commission. The Commission ruled that Mrs. Maryboy's income as a state employee and Mr. Maryboy's income as a county commissioner were fully taxable to Utah. The Maryboys appealed.

On a motion for summary disposition, this Court remanded for the Commission to determine whether the Maryboys were required to pay the assessed taxes, penalties, and interest as provided by Utah Code Ann. s 59-1-505 prior to pursuing their appeal. The Commission held a formal hearing and ruled that the Maryboys were required to deposit the deficiency to pursue their appeal. The Maryboys now challenge both the Commission's determination of their Utah income tax liability and the Commission's decision that they were required to pay $10,855.38 in taxes, penalties, and interest as a condition of pursuing this appeal.

***665** I. STATE INCOME TAX

We first address the Maryboys' contention that the Commission erred in ruling that Mr. Maryboy's income from

employment as a county commissioner and Mrs. Maryboy's income from her state employment is taxable. This issue presents a question of law. Accordingly, we grant the Commission no deference but apply a correction-of-error standard. Utah Code Ann. s 59-1-610(1)(b) (Supp.1994); Fatt v. Utah State Tax Comm'n, 884 P.2d 1233, 1234 (Utah 1994).

The Maryboys assert that McClanahan v. Arizona State Tax Commission, 411 U.S. 164, 93 S.Ct. 1257, 36 L.Ed.2d 129 (1973), controls the issue of the taxability of their incomes. In McClanahan, the Court held that Arizona could not impose its personal income tax on "reservation Indians with income derived wholly from reservation sources." 411 U.S. at 165. The Maryboys argue that under McClanahan, Utah has no authority to tax income they earned from on-Reservation activities. The Maryboys also rely on Mescalero Apache Tribe v. Jones, 411 U.S. 145, 93 S.Ct. 1267, 36 L.Ed.2d 114 (1973), which held that the gross receipts of a tribally operated ski resort located outside the boundaries of a reservation were subject to state taxation. The Court explained that when tribal members go beyond the boundaries of the reservation, they have "generally been subject to nondiscriminatory state law otherwise applicable to all citizens of the state." Id. at 148-49, 93 S.Ct. at 1270- 71. The Maryboys assert that McClanahan and Mescalero require that their income tax liability be tailored to include only that portion of their income received for activities that occurred outside the Reservation boundaries.

The Commission contends that McClanahan does not preclude taxation of the Maryboys' income because McClanahan did not deal with " 'Indians who have left ... reservations ... [but] involve[d] the narrow question whether the State may tax a reservation Indian for income earned exclusively on the reservation' " (quoting McClanahan, 411

U.S. at 167-68, 93 S.Ct. at 1259-60 (citations omitted)). Citing White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 142, 100 S.Ct. 2578, 2583, 65 L.Ed.2d 665 (1980), the Commission argues that the validity of the tax turns on whether the imposition of the tax infringes tribal sovereignty and whether the right of the state to tax the governmentally paid salaries of the Maryboys is preempted by federal law. The Commission asserts that the tax does not interfere with tribal sovereignty, i.e., the right of the Navajo Nation to make its own laws, because the State of Utah merely seeks to tax its own elected officials and employees. The Commission also argues that the tax is not preempted by federal law because no federal law expressly precludes states from taxing their own elected officials and employees and because Native Americans who go " 'beyond reservation boundaries have generally been held subject to nondiscriminatory state law otherwise applicable to all citizens of the state' " (quoting Mescalero, 411 U.S. at 148-49, 93 S.Ct. at 1270-71).

The United States Supreme Court has stated that "there is no rigid rule by which to resolve the question whether a particular state law may be applied to an Indian reservation or to tribal members." White Mountain, 448 U.S. at 142, 100 S.Ct. at 2583. The semi-independent status of tribes and Congress' broad power to regulate tribal affairs create "two independent but related barriers to the assertion of state regulatory authority over tribal reservations and members." Id.

[1][2][3][4] First, federal law may preempt the exercise of state authority. In this context, standards of preemption that have emerged in other areas of the law are not appropriate. White Mountain, 448 U.S. at 143, 100 S.Ct. at 2583; Cotton Petroleum Corp. v. New Mexico, 490 U.S. 163, 184, 109 S.Ct. 1698, 1711-12, 104 L.Ed.2d 209 (1989). "Tribal reservations

are not States, and the differences in the form and nature of their sovereignty make it treacherous to import to one notions of pre-emption that are properly applied to the other." White Mountain, 448 U.S. at 143, 100 S.Ct. at 2583. The concept of Indian sovereignty, which traditionally barred the extension of state law to reservations, must guide a preemption determination. It "provides a backdrop against which the applicable treaties and statutes must be read." McClanahan, 411 U.S. at 168, 172, 93 ***666** S.Ct. at 1260, 1262; White Mountain, 448 U.S. at 143, 100 S.Ct. at 2583. Ambiguities in treaties and federal statutes are to be construed generously in light of the firm federal policy of promoting tribal self-sufficiency and economic development. White Mountain, 448 U.S. at 143-44, 100 S.Ct. at 2583-84; Montana v. Blackfeet Tribe of Indians, 471 U.S. 759, 766, 105 S.Ct. 2399, 2403, 85 L.Ed.2d 753 (1985); McClanahan, 411 U.S. at 174, 93 S.Ct. at 1263. Thus, an express congressional statement preempting a state's assertion of authority is not required; state action may be preempted solely by reason of federal policies and interests. White Mountain, 448 U.S. at 144, 100 S.Ct. at 2584.

[5][6][7] Nevertheless, state regulatory interests must also be given weight. Id.; McClanahan, 411 U.S. at 171, 93 S.Ct. at 1261-62. Even on reservations, state law may be applied unless its application would interfere with tribal self-government or impair a right granted or reserved by federal law. Mescalero, 411 U.S. at 148, 93 S.Ct. at 1270; see California v. Cabazon Band, 480 U.S. 202, 214-15, 107 S.Ct. 1083, 1091-92, 94 L.Ed.2d 244 (1987). " 'Under certain circumstances a State may validly assert authority over the activities of nonmembers on a reservation, and ... in exceptional circumstances a State may assert jurisdiction over the on-reservation activities of tribal members.' " Cabazon Band,

480 U.S. at 214-15, 107 S.Ct. at 1090-91 (quoting New Mexico v. Mescalero Apache Tribe, 462 U.S. 324, 331-32, 103 S.Ct. 2378, 2384-85, 76 L.Ed.2d 611 (1983)). It follows that a preemption analysis requires "a particularized inquiry into the nature of the state, federal, and tribal interests at stake, an inquiry designed to determine whether, in the specific context, the exercise of state authority would violate federal law." White Mountain, 448 U.S. at 145, 100 S.Ct. at 2584; see Cotton Petroleum, 490 U.S. at 184, 109 S.Ct. at 1711-12; Ramah Navajo School Bd. v. Bureau of Revenue, 458 U.S. 832, 837, 102 S.Ct. 3394, 3398, 73 L.Ed.2d 1174 (1982); Washington v. Confederated Tribes of the Colville Indian Reservation, 447 U.S. 134, 156-57, 100 S.Ct. 2069, 2082-83, 65 L.Ed.2d 10 (1980).

[8][9][10][11][12] The second barrier to the exercise of state authority is that such authority "may unlawfully infringe 'on the right of reservation Indians to make their own laws and be ruled by them.' " White Mountain, 448 U.S. at 142, 100 S.Ct. at 2583 (citations omitted) (quoting Williams v. Lee, 358 U.S. 217, 220, 79 S.Ct. 269, 270-71, 3 L.Ed.2d 251 (1959)). Where "both the tribe and the State could fairly claim an interest in asserting their respective jurisdictions," the principles of tribal self- government were "designed to resolve this conflict by providing that the State could protect its interest up to the point where tribal self-government would be affected." McClanahan, 411 U.S. at 179, 93 S.Ct. at 1266; see Williams, 358 U.S. at 220, 79 S.Ct. at 270-71; White Mountain, 448 U.S. at 142, 100 S.Ct. at 2583. This analysis is "grounded in notions of inherent sovereignty and in congressional policies, [and] seeks an accommodation between the interests of the Tribes and the Federal Government, on the one hand, and those of the State, on the other." Colville, 447 U.S. at 156, 100 S.Ct. at 2083. On this analysis, on-reservation activity involving only

tribal members is generally exempt from state law. Id. at 156-67, 100 S.Ct. at 2082-88; see, e.g., McClanahan, 411 U.S. at 179-80, 93 S.Ct. at 1266-67; Moe v. Confederated Salish & Kootenai Tribes, 425 U.S. 463, 480, 96 S.Ct. at 1644-45 (1976). When state taxation is at issue, tribal interests are strongest when a tax is based on value derived from on-reservation conduct involving only tribal members and where the taxpayer is the recipient of tribal services. Colville, 447 U.S. at 156-67, 100 S.Ct. at 2082-88; see Moe, 425 U.S. at 475-81, 96 S.Ct. at 1642. On the other hand, a state tax is generally valid when the tax is directed at value generated off the reservation and the taxpayer is the recipient of a state's services. Colville, 447 U.S. at 156- 62, 100 S.Ct. at 2082-86. In those circumstances, the state interest is at its strongest and the burden on the tribe is likely to be minimal. Id.; see, e.g., Cotton Petroleum, 490 U.S. at 184-91, 109 S.Ct. at 1711-12.

While protection of the interests of tribal self-government alone can be a sufficient bar to a state's exercise of authority on the reservation, ***667** it is related to the preemption analysis because the "right of tribal self-government is ultimately dependent on and subject to the broad power of Congress." White Mountain, 448 U.S. at 143, 100 S.Ct. at 2583. Thus, when assessing the validity of a state tax, the Supreme Court has generally focused on a preemption analysis with the principles of tribal self-government acting as a backdrop. For example, in Cotton Petroleum Corp. v. New Mexico, 490 U.S. 163, 175-77, 109 S.Ct. 1698, 1706-08, 104 L.Ed.2d 209 (1989), the Court held that federal law did not preempt state oil and gas severance taxes imposed on a non-Indian lessee producing oil from on-reservation wells. In Washington v. Confederated Tribes of the Colville Indian Reservation, 447 U.S. 134, 151, 155-59, 100 S.Ct. 2069, 2071, 2082-84, 65 L.Ed.2d 10 (1980), the Court held that a state

cigarette sales tax imposed on sales by tribal members to nontribal members was not preempted by a tax imposed by the tribal government. The Court explained that the state's interest in taxing nontribal member purchasers outweighed any tribal interest in preventing the tax. Id. In Ramah Navajo School Board v. Bureau of Revenue, 458 U.S. 832, 838-43, 102 S.Ct. 3394, 3398-3401, 73 L.Ed.2d 1174 (1982), the Court held that a comprehensive federal regulatory scheme governing construction of autonomous Indian educational facilities preempted the state's authority to impose gross- receipts tax on the non-Indian contractor. In White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 150, 100 S.Ct. 2578, 2587, 65 L.Ed.2d 665 (1980), the Court held that a use fuel tax imposed on a nontribal logging company that was working on the reservation was preempted by (1) a comprehensive federal scheme, (2) the fact that the tax burden ultimately fell on the tribe, and (3) the state's inability to justify taxes except in terms of a generalized interest in revenue. In Moe v. Salish & Kootenai Tribes, 425 U.S. 463, 480- 81, 96 S.Ct. 1634, 1644-45, 48 L.Ed.2d 96 (1976), the Court held that personal property taxes could not be applied to tribal members who resided on the reservation because the taxes conflicted with applicable federal statutes.

[13] Despite the flexible and particularized analysis reflected in the above cases, the Maryboys assert that McClanahan creates a per se rule against taxing Native Americans who reside on the reservation and derive their income from activities that take place on the reservation. We disagree. In McClanahan, the Court employed a preemption analysis to determine whether the relevant treaties and statutes allowed Arizona's exertion of authority over Mrs. McClanahan. 411 U.S. at 172-79, 93 S.Ct. at 1262-66. The Court held that they did not and that Arizona had exceeded its lawful authority by attempting to tax McClanahan. Id. at 173, 93 S.Ct. at 1263.

"Since appellant is an Indian and since her income is derived wholly from reservation sources, her activity is totally within the sphere which the relevant treaty and statutes leave for the Federal Government and for the Indians themselves." Id. at 179-80, 93 S.Ct. at 1266-67. In Mescalero Apache Tribe v. Jones, 411 U.S. 145, 146, 93 S.Ct. 1267, 1269, 36 L.Ed.2d 114 (1973), the Court summarized the McClanahan holding: [I]n the special area of state taxation, absent cession of jurisdiction or other federal statutes permitting it, there has been no satisfactory authority for taxing Indian reservation lands or Indian income from activities carried on within the boundaries of the reservation, and [McClanahan], lays to rest any doubt in this respect by holding that such taxation is not permissible absent congressional consent. 411 U.S. at 148, 93 S.Ct. at 1270 (citations omitted). County of Yakima v. Yakima Nation, 502 U.S. 251, 258, 112 S.Ct. 683, 688, 116 L.Ed.2d 687 (1992), also held that a state was without power to tax reservation Indians absent cession of jurisdiction or a federal statute making congressional intention to authorize state taxation unmistakably clear. Although these cases could be construed to have erected a per se rule against state taxation in such circumstances, [FN1] the McClanahan ***668** rule provides only a beginning point for our analysis because we must in addition conduct a "particularized inquiry into the nature of the state, federal, and tribal interests at stake," see White Mountain, 448 U.S. at 145, 100 S.Ct. at 2584, to determine whether the state taxing authority can be asserted under the circumstances. Thus, as the Court has recently stated, McClanahan establishes a "presumption against state taxing authority" which "counsels against finding [state] jurisdiction" to tax Native Americans residing on the reservation or in Indian country. Oklahoma Tax Comm'n v. Sac & Fox Nation, --- U.S. ----, ---- - ----, 113 S.Ct. 1985, 1991-92, 124 L.Ed.2d 30 (1993). In Sac & Fox Nation, the Court addressed whether a tribal member who does not live

on a formal reservation is exempt from state income taxes under McClanahan. The Court explained, "The residence of a tribal member is a significant component of the McClanahan presumption against state tax jurisdiction." Id. at ---- - ----, 113 S.Ct. at 1990-91. The Court held that it was enough for a tribal member to live in "Indian Country" and that the tribal member need not live on a formal reservation to be entitled to the benefit of the McClanahan presumption. Id. at ---- - ----, 113 S.Ct. at 1991-92.

FN1. In California v. Cabazon Band, 480 U.S. 202, 107 S.Ct. 1083, 94 L.Ed.2d 244 (1987), which addressed the validity of state regulations of on-reservation bingo games, the Court stated in a footnote, "In the special area of state taxation of Indian tribes and tribal members, we have adopted a per se rule." Id. at 216 n. 17, 107 S.Ct. at 1092 n. 17.

[14] In this case, the federal interests are similar to those in McClanahan. As amicus curiae Navajo Nation points out, the federal laws at issue are substantially the same. First, the Navajo Treaty of 1868 "set apart" the Reservation "for the use and occupation of the Navajo tribe." 15 Stat. 667, 668 (1868); McClanahan, 411 U.S. at 174, 93 S.Ct. at 1263. Second, the Utah Enabling Act provided that Utah would "forever disclaim all rights and title ... to all lands lying within said limits owned or held by any Indian or Indian tribes." 28 Stat. 107, 108 (1894). Citing similar language in the Arizona Enabling Act, the McClanahan Court stated that it illustrated that "Congress has consistently acted upon the assumption that the States lacked jurisdiction over Navajos living on the reservation." McClanahan, 411 U.S. at 175, 93 S.Ct. at 1264 (citing Williams, 358 U.S. at 220-21, 79 S.Ct. at 270-71).

Many of the tribal interests involved here also are

similar to those in McClanahan. The Maryboys are enrolled members of the Navajo Tribe and live on the Reservation. Accordingly, McClanahan counsels against finding state authority to tax their on-Reservation income. See Sac & Fox Nation, --- U.S. at ---- - ----, 113 S.Ct. at 1991-92.

Nevertheless, "[t]his is not a case in which the State has had nothing to do with the on-reservation activity, save tax it. Nor is this a case in which an unusually large state tax has imposed a substantial burden on the Tribe." Cotton Petroleum, 490 U.S. at 186, 109 S.Ct. at 1713. In this case, unlike McClanahan, "both the tribe and the State could fairly claim an interest in asserting their respective jurisdictions." McClanahan, 411 U.S. at 179, 93 S.Ct. at 1266. We must therefore analyze the relevant state interests involved to determine whether the state's interests overcome the McClanahan presumption against state taxing jurisdiction.

The state's interest in Mrs. Maryboy's income as a therapist for San Juan Mental Health is not sufficiently different from Arizona's interest in McClanahan to overcome the presumption. [FN2] Utah clearly has an interest in the mental health services it provides to the Navajos on the Reservation and can fairly be said to have jurisdiction over those it employs to furnish these services. However, the services the state provides are much like those provided by the private sector, and Mrs. Maryboy's employment as a therapist is not unlike a therapist's position in a private mental health clinic. Her employment activity on the Reservation depends entirely on the need or desire of Reservation Navajos for mental health services. This is a value derived from on-reservation conduct involving only tribal members. Under McClanahan, the state would be precluded from taxing this type of activity in the private sector, because it would be "totally within the sphere

which the relevant treaty and statutes leave for the Federal Government and for *669 the Indians themselves." 411 U.S. at 179-80, 93 S.Ct. at 1266-67. We are unpersuaded that the state's interest in providing mental health services to the Reservation is sufficient to overcome this presumption. We hold that the state's attempt to tax Mrs. Maryboy's income violates federal law.

FN2. Although the Court in McClanahan did not state the nature of McClanahan's employment, counsel at oral argument asserted that she worked at the on-reservation branch of an off-reservation, nontribal bank.

[15] In addition, although Mrs. Maryboy participates in administrative and training activities off the Reservation, these activities do not alter her employment so as to take her "beyond the boundaries of the reservation" and subject her to "nondiscriminatory state law otherwise applicable to all citizens." Mescalero, 411 U.S. at 148-49, 93 S.Ct. at 1270-71. Mrs. Maryboy was hired to provide mental health services to Navajos living on the Reservation. Her administrative and training activities are merely incidental to her duty to provide counseling to Reservation Navajos. Thus, we reject the argument that her income must be apportioned on the basis of the percentage of time she spends on work activities outside the Reservation boundaries. Accordingly, we hold that the Commission erred in assessing Utah income tax on Mrs. Maryboy's income as a therapist for San Juan Mental Health.

[16] The state interests relevant to Mr. Maryboy's income as a commissioner for San Juan County present different considerations. The state's interest could not be more compelling than when it involves a publicly elected official acting in his capacity as a representative of the state and

performing a state function. Whether Mr. Maryboy is working on or off the Reservation, when he is functioning as a county commissioner he is representing the citizens of San Juan County. As county commissioner, he coordinates county programs with the tribal government, including public safety, natural resources, education, and health programs, coordinates and matches county funds with tribal programs to provide services for Navajo county residents, and participates in county administrative and policy-making decisions. All of his commissioner activities are necessarily for the benefit of San Juan County and affect the lives of the citizens of San Juan County, whether or not they are Reservation Navajos.

In addition, although he is elected by the constituents of district three, Mr. Maryboy's duties and policy-making power have county-wide effect; his votes as a county commissioner carry the same weight as the votes cast by the other two county commissioners elected to serve San Juan County. Clearly, with respect to Mr. Maryboy's income as a county commissioner, the state has a paramount interest in the activity it seeks to tax quite apart from its general interest in raising revenues; "[t]his is not a case in which the State has had nothing to do with the on-reservation activity, save tax it." Cotton Petroleum, 490 U.S. at 186, 109 S.Ct. at 1713.

Likewise, allowing the state to tax elected officials of state subdivisions who work on the Reservation does not create a substantial burden on the ability of tribal members to make their own laws and be governed by them. Although Mr. Maryboy is an enrolled member of the Navajo tribe and lives on the Reservation, his income is not derived from "value generated on the reservation." Colville, 447 U.S. at 156-57, 100 S.Ct. at 2082-83. When he is working as a county commissioner on the Reservation, he is still functioning in a

county capacity and receiving the benefits derived from citizen participation in state government. That he spends time on the Reservation in his official county commissioner capacity does not diminish the distinct nature of his employment; Mr. Maryboy does not lose his status and powers to function as a county commissioner when he steps onto the Reservation.

The Navajo Nation asserts that allowing the state to impose this tax nullifies the tribe's prerogative not to impose an income tax on its tribal members and thus infringes on tribal self-government. However, the tax does not interfere with the tribe's power to impose its own income tax; each government may impose, or not impose, its tax without ousting the other. Colville, 447 U.S. at 158, 100 S.Ct. at 2083-84; Cotton Petroleum, 490 U.S. at 188, 109 S.Ct. at 1713-14. In addition, Native Americans going beyond the boundaries of the reservation have "generally been subject to nondiscriminatory state law otherwise applicable to all citizens of the State" absent express federal law to the contrary. ***670** Mescalero, 411 U.S. at 148-49, 93 S.Ct. at 1270. Mr. Maryboy's employment as a publicly elected official in the State of Utah is necessarily beyond the Reservation boundaries and tribal self-government. As such, it is subject to the same nondiscriminatory tax laws otherwise applicable to citizens of Utah. See Colville, 447 U.S. at 151, 169, 100 S.Ct. at 2080, 2089.

We hold that the state interests involved overcome the McClanahan presumption against finding state authority and that state taxation of Mr. Maryboy's income as a county commissioner does not violate federal law. Accordingly, we affirm the Commission's ruling that Mr. Maryboy's entire income as a county commissioner is subject to Utah income tax. We reverse the Commission's ruling that Mrs. Maryboy's income as an employee of San Juan Mental Health is taxable in

Utah.

II. PAYMENT OF DEFICIENCY

The Maryboys assert that the Commission's order requiring them, pursuant to Utah Code Ann. s 59-1-505, [FN3] to deposit the deficiency of income taxes, penalties, and interest prior to pursuing this appeal violated their constitutional right to have open access to the courts of this state. They assert that the uncontradicted evidence presented at the hearing on limited remand demonstrated that they did not have sufficient liquid assets available to pay the deficiency and that virtually all of their discretionary income would be spent in loan payments if they obtained a loan to pay the deficiency. Thus, they contend that, under Jensen v. State Tax Commission, 835 P.2d 965, 969 (Utah 1992), the Commission should have allowed them to seek judicial review without paying the deficiency. We disagree.

FN3. Section 59-1-505 provides, "A taxpayer who, after receiving a final decision from the commission in accordance with the other provisions of this part, desires to seek judicial review of that decision shall deposit the full amount of the taxes, interest, and penalties with the commission."

[17][18][19] In reviewing the Commission's order, we grant the Commission deference concerning its factual determinations, "applying a substantial evidence standard of review." Utah Code Ann. s 59-1-610(1)(a) (Supp.1994); see Kennecott Corp. v. Utah State Tax Comm'n, 858 P.2d 1381, 1385 (Utah 1993). Substantial evidence is " 'that quantum and quality of relevant evidence that is adequate to convince a reasonable mind to support a conclusion.' " Utah Assoc. of Counties v. Tax Comm'n ex rel. Am. Tel. & Tel. Co., 895 P.2d 819, 821 (Utah 1995) (quoting U.S. West Communications v.

Public Serv. Comm'n, 882 P.2d 141, 146 (Utah 1993)). We do not reweigh the evidence but defer to the Commission to resolve issues involving conflicting views if its findings are supported by substantial evidence. See Utah Assoc. of Counties, 895 P.2d at 821.

[20] Our review of the record reveals substantial evidence to support the Commission's findings on limited remand. The Commission found that the Maryboys "had a combined income in 1992 of over $77,000." The Commission also found, "In addition to owning savings bonds and maintaining a pension plan worth $47,000, [the Maryboys] own two residences and two relatively new vehicles." On the basis of that evidence, the Commission determined that the Maryboys had the ability to pay the deficiency, but found it inconvenient to do so.

Relying on Jensen, the Commission found that the inconvenience the Maryboys would suffer in procuring the $10,855.38 deficiency was not sufficient to deny them reasonable access to judicial review. We agree. In Jensen, this Court addressed whether s 59-1-505 violates the open courts provision, article I, section 11 of the Utah Constitution. [FN4] The petitioners in Jensen had been assessed a deficiency of $344,419 in income taxes, penalties, and interest. They were unable to ***671** comply with s 59-1-505, and thus strict application of that section precluded judicial review of the Commission's final order. We stated that "to the extent s 59-1-505 precludes reasonable access to judicial review, it violates the open courts provision" and held, as applied to the facts of that case, that it was an effective bar to judicial review and was unconstitutional as applied. Jensen, 835 P.2d at 969.

FN4. Article I, section 11 of the Utah Constitution

states: All courts shall be open, and every person, for an injury done to him in his person, property or reputation, shall have remedy by due course of law, which shall be administered without denial or unnecessary delay; and no person shall be barred from prosecuting or defending before any tribunal in this State, by himself or counsel, any civil cause to which he is a party.

Unlike the petitioners in Jensen, the Maryboys were financially able to pay the $10,855.38 deficiency. Although the requirement in s 59-1-505 inconvenienced them, it did not deny them reasonable access to judicial review. As we made clear in Jensen, s 59-1-505 "is not unconstitutional in all cases. When a taxpayer is able to meet the requirement, the deposit must be paid." 835 P.2d at 969. This is just such a case.

Affirmed in part; reversed in part.

ZIMMERMAN, C.J., and DURHAM and RUSSON, JJ., concur.

HOWE, Justice, concurring and dissenting:

I concur except as to that part of the opinion dealing with the income of Mrs. Maryboy from state employment. As to that part, I dissent.

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